

§ 236.1

Controlled Substance Act (21 U.S.C. §802).

(xi) That a participant will be subject to random checks or inspections that may be conducted by the Service at any time and at any location, to ensure compliance.

(xii) That current vehicle registration and, if applicable, current permission to use the vehicle in PORTPASS, and evidence of current vehicle insurance, shall be in the vehicle at all times during use of PORTPASS.

(xiii) Participant agrees to notify the Service if a vehicle approved for use in a PORTPASS program is sold, stolen, damaged, or disposed of otherwise. If a vehicle is sold, it is the responsibility of the participant to remove or obliterate any identifying device or other authorization for participation in the program or at the time of sale unless otherwise notified by the Service. If any license plates are replaced on an enrolled vehicle, the participant must submit a properly executed Form I-823, without fee, prior to use of the vehicle in the PORTPASS program.

(xiv) That APP-approved participants who wish to enter the United States through a POE other than one designated as an APP through which they may pass must present themselves for inspection or examination by an immigration officer during normal business hours. Entry to the United States during hours when a Port of Entry is not staffed may be made only through a POE designated as an APP.

(b) *Violation of condition of the PORTPASS program.* A PORTPASS program participant who violates any condition of the PORTPASS program, or who has violated any immigration law or regulation, or a law or regulation of the United States Customs Service or other Federal Inspection Service, or who is otherwise determined by an immigration officer to be inadmissible to the United States or ineligible to participate in PORTPASS, may have the PORTPASS access revoked at the discretion of the district director or the chief patrol agent and may be subject to other applicable sanctions, such as criminal and/or administrative prosecution or deportation, as well as possible seizure of goods and/or vehicles.

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(c) *Judicial review.* Nothing in this section is intended to create any right or benefit, substantive or procedural, enforceable in law or equity by a party against the Department of Justice, the Immigration and Naturalization Service, their officers or any employees of the Department of Justice.

[61 FR 53831, Oct. 16, 1996]

PART 236—EXCLUSION OF ALIENS

Sec.

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AUTHORITY: 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1362.

§ 236.1 Authority of immigration judges.

In determining cases referred for further inquiry as provided in section 235 of the Act, immigration judges shall have the powers and authority conferred upon them by the Act and this chapter. Subject to any specific limitation prescribed by the Act and this chapter, immigration judges shall also exercise the discretion and authority conferred upon the Attorney General by the Act as is appropriate and necessary for the disposition of such cases.

[42 FR 46045, Sept. 14, 1977]

§ 236.2 Hearing.

(a) *Opening.* Exclusion hearings shall be closed to the public, unless the alien at his own instance requests that the public, including the press, be permitted to attend; in that event, the hearing shall be open, provided that the alien states for the record that he is waiving the requirement in section 236 of the Act that the inquiry shall be

kept separate and apart from the public. When the hearing is to be open, depending upon physical facilities, reasonable limitation may be placed upon the number in attendance at any one time, with priority being given to the press over the general public. The Immigration Judge shall ascertain whether the applicant for admission is the person to whom Form I-122 was previously delivered by the examining immigration officer as provided in part 235 of this chapter; enter a copy of such form in evidence as an exhibit in the case; inform the applicant of the nature and purpose of the hearing; advise him of the privilege of being represented by an attorney of his own choice at no expense to the Government, and of the availability of free legal services programs qualified under part 292a of this chapter and organizations recognized pursuant to §292.2, of this chapter located in the district where his exclusion hearing is to be held; and shall ascertain that the applicant has received a list of such programs; and request him to ascertain then and there whether he desires representation; advise him that he will have a reasonable opportunity to present evidence in his own behalf, to examine and object to evidence against him, and to cross-examine witnesses presented by the Government; and place the applicant under oath.

(b) *Procedure.* The immigration judge shall receive and adduce material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing.

(c) *General attorney.* The district director shall direct the chief legal officer to assign a general attorney to each case in which an applicant's nationality is in issue. The district director may direct the chief legal officer to assign a general attorney to any case in which the district director deems such assignment necessary or advantageous. The duties of the general attorney include, but are not limited to, the presentation of evidence and the interrogation, examination, and cross-examination of the applicant and other witnesses. Nothing contained herein diminishes the authority of an immigration judge to conduct proceedings under this part.

(d) *Depositions.* The procedures specified in §242.14(e) of this chapter shall apply.

(e) *Record.* The hearing before the immigration judge, including the testimony and exhibits, the immigration judge's decision, and all written orders, motions, appeals, and other papers filed in the proceeding shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the immigration judge.

[42 FR 46045, Sept. 14, 1977, as amended at 44 FR 4653, Jan. 23, 1979; 46 FR 43956, Sept. 2, 1981]

§236.3 Applications for asylum or withholding of deportation.

(a) If the alien expresses fear of persecution or harm upon return to his or her country of origin or to a country to which the alien may be deported after a determination of excludability from the United States pursuant to part 237 of this chapter, and the alien has not been referred to the immigration judge by an asylum officer in accordance with §208.14(b) of this chapter, the immigration judge shall:

(1) Advise the alien that he may apply for asylum in the United States or withholding of deportation to that other country; and

(2) Make available the appropriate application forms.

(b) An application for asylum or withholding of deportation must be filed with the Immigration Court, pursuant to §208.4(c) of this chapter. Upon receipt of an application that has not been referred by an asylum officer, the Immigration Court shall forward a copy to the Department of State pursuant to §208.11 of this chapter and shall calendar the case for a hearing. The reply, if any, from the Department of State, unless classified under E.O. 12356 (3 CFR, 1982 Comp., p. 166), shall be given to both the applicant and to the trial attorney representing the government.

(c) Applications for asylum or withholding of deportation so filed will be decided by the immigration judge pursuant to the requirements and standards established in part 208 of this chapter after an evidentiary hearing

that is necessary to resolve material factual issues in dispute. An evidentiary hearing extending beyond issues related to the basis for a mandatory denial of the application pursuant to 8 CFR 208.14 or 208.16 is not necessary once the immigration judge has determined that such a denial is required.

(1) Evidentiary hearings on applications for asylum or withholding of deportation will be closed to the public unless the applicant expressly requests that it be open pursuant to 8 CFR 236.2.

(2) Nothing in this section is intended to limit the authority of the immigration judge properly to control the scope of any evidentiary hearing.

(3) During the exclusion hearing, the applicant shall be examined under oath on his application and may present evidence and witnesses on his own behalf. The applicant has the burden of establishing that he is a refugee as defined in section 101(a)(42) of the Act pursuant to the standard set forth in §208.13 of this chapter.

(4) The trial attorney for the government may call witnesses and present evidence for the record, including information classified under E.O. 12356 (3 CFR, 1982 Comp., p. 166), provided the immigration judge or the Board has determined that such information is relevant to the hearing. When the immigration judge receives such classified information he shall inform the applicant. The agency that provides the classified information to the immigration judge may provide an unclassified summary of the information for release to the applicant whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its source. The summary should be as detailed as possible, in order that the applicant may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state that such information is material to the decision.

(d) The decision of an immigration judge to grant or deny asylum or withholding of deportation shall be communicated to the applicant and to the trial attorney for the government. An adverse decision will state why asylum

or withholding of deportation was denied.

[55 FR 30686, July 27, 1990, as amended at 59 FR 62302, Dec. 5, 1994; 60 FR 34090, June 30, 1995]

§236.4 Renewal of application for adjustment of status under section 245 of the Act.

An adjustment application by an alien paroled under section 212(d)(5) of the Act, which has been denied by the district director, may be renewed in exclusion proceedings under section 236 of the Act before an immigration judge under the following two conditions: First, the denied application must have been properly filed subsequent to the applicant's earlier inspection and admission to the United States; second, the applicant's later absence from and return to the United States must have been under the terms of an advance parole authorization on Form I-512 granted to permit the applicant's absence and return to pursue the previously filed adjustment application.

[43 FR 16445, Apr. 19, 1978]

§236.5 Decision of the immigration judge; notice to the applicant.

(a) *Decision.* The Immigration Judge shall inform the applicant of his or her decision in accordance with §3.35 of this chapter.

(b) *Advice to alien ordered excluded.* An alien ordered excluded shall be furnished with Form I-296, Notice to Alien Ordered Excluded by Immigration Judge, at the time of an oral decision by the immigration judge or upon service of a written decision.

(c) *Holders of refugee travel documents.* Aliens who are the holders of valid unexpired refugee travel documents may be ordered excluded only if they are found to be inadmissible under section 212(a) (9), (10), (12), (23), (27), (28), (29), or (31) of the Act, and it is determined that on the basis of the acts for which they are inadmissible there are compelling reasons of national security or public order for their exclusion. If the immigration judge finds that the alien is inadmissible but determines that there are no compelling reasons of national security or public order for exclusion, the immigration judge shall

remand the case to the district director for parole.

[42 FR 46045, Sept. 14, 1977. Redesignated at 43 FR 16445, Apr. 19, 1978, and amended at 52 FR 2939, Jan. 29, 1987]

§ 236.6 Finality of order.

The decision of the Immigration Judge shall become final in accordance with § 3.37 of this chapter.

[52 FR 2939, Jan. 29, 1987]

§ 236.7 Appeals.

Except as limited by section 236 of the Act, an appeal from a decision of an Immigration Judge under this part may be taken by either party pursuant to § 3.38 of this chapter.

[61 FR 18909, Apr. 29, 1996]

§ 236.8 Fingerprinting of excluded aliens.

Every alien 14 years of age or older who is excluded from admission to the United States by an immigration judge shall be fingerprinted, unless during the preceding year he has been fingerprinted at an American consular office.

[42 FR 46045, Sept. 14, 1977. Redesignated at 43 FR 16445, Apr. 19, 1978]

§ 236.9 Visa Waiver Pilot Program.

Pursuant to section 217(b)(4)(A) of the Act, an alien who applies for admission to the United States under the provisions of that section must waive any right to review or appeal an immigration officer's determination as to the admissibility of the alien at a port of entry, other than on the basis of an application for asylum. An alien applicant for admission under section 217 of the Act shall be removed from the United States upon a determination by an immigration officer (port director, officer-in-charge, or officer acting in either capacity) that the alien is inadmissible in accordance with procedures in § 217.4(b) of this chapter except that such an alien who applies for asylum in the United States shall be referred to an immigration judge for further inquiry as provided in section 235 of the Act and § 236.3 of this part.

[53 FR 24903, June 30, 1988]

§ 236.10 Exclusion of alien seeking admission under section 101(a)(15)(S) of the Act.

An alien who applies for admission under the provisions of section 101(a)(15)(S) of the Act who is determined by an immigration officer not to be eligible for admission under that section or to be excludable from the United States under one or more of the grounds of excludability listed in section 212 of the Act, which have not been previously waived by the Commissioner, will be taken into custody and will be subject to the exclusion procedures contained in 8 CFR part 236.

[60 FR 44268, Aug. 25, 1995]

PART 237—DEPORTATION OF EXCLUDED ALIENS

Sec.

237.1 Stay of deportation of excluded alien.

237.2 Notice to surrender for deportation.

237.3 Cost of maintenance not assessed.

237.4 [Reserved]

237.5 Notice to transportation line of alien's exclusion.

237.6 Deportation.

AUTHORITY: 8 U.S.C. 1103, 1227, and 1255.

§ 237.1 Stay of deportation of excluded alien.

The district director in charge of the port of arrival may stay the immediate deportation of an excluded alien pursuant to sections 237 (a) and (d) of the act under such conditions as he may prescribe.

[23 FR 5818, Aug. 1, 1958]

§ 237.2 Notice to surrender for deportation.

An alien who has been finally excluded pursuant to part 236 of this chapter may at any time surrender himself to the custody of the Service and shall surrender himself to such custody upon notice in writing of the time and place for his surrender. The Service may take the alien into custody at any time. An alien taken into custody either upon notice to surrender or by arrest shall not be deported less than 72 hours thereafter without his consent thereto filed in writing with the district director in charge of the place of his detention. An alien in